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HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

No. 353

COWLES PUBLISHING COMPANY, *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

No.----------

COWLES PUBLISHING COMPANY, *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

Petitioner, Cowles Publishing Company, a Washington corporation, prays that a writ of certiorari be issued to review the decision of the Court of Appeals for the Ninth Circuit entered on June 28, 1954, modifying and affirming an order of the National Labor Relations Board upon its petition for enforcement of said order made August 20, 1953 (R. 23-28).

## (a) OPINION BELOW AND PRECEDING OPINIONS

The opinion of the Court of Appeals on the present petition for enforcement of the order of the Board (App. ii-ix) is not yet reported. The decision of the Board prior to the enforcement proceeding is reported in 106 NLRB 131 (App. x-xv) (P. 23-29).

(b) JURISDICTION

The decision of the Court of Appeals was entered June 28, 1954. An order denying a petition for rehearing and petition to remand was entered on August 3, 1954. A decree enforcing the order was filed September 7, 1954 (App. xx). On August 10, 1954, an order staying issuance of mandate was entered (App. xvi-xvii) pending the filing, consideration and disposition by this Court of a petition for certiorari to be made by September 20, 1954. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10(e) of the National Labor Relations Act.

(c) QUESTIONS PRESENTED FOR REVIEW

1. Whether the discharge of certain part-time, unorganized and non-union "inserters," most of whom were local college students, by a newspaper with no labor dispute of any kind, no notice of any grievances, fancied or otherwise, no bad faith on the part of the newspaper, and with the employees presenting a surprise grievance as the paper came off the press and demanding an answer within 40 minutes, constituted an unfair labor practice within the meaning of Section 8 (a) (1) and (7) of the National Labor Relations Act, as amended by the Labor-Management Relations Act, 1947, 61 Stat. 140, 29 U. S. C. A., §157, 158 (a) (1)?

2. Whether the discharge of the student inserters because they quit right in the middle of their job when the newspapers were coming from the press was a discharge "for cause" within the meaning of Section 10(c) of the National Labor Relations Act, as amended?

3. Whether the Court of Appeals departed from the accepted and usual course of judicial proceedings and permitted the Board to shift the burden of proof as to discriminatory motivation to the newspaper employer, and sanctioned such a departure by the Board which based its findings on the inadequacy of evidence by the newspaper employer to establish its asserted lawful reason for the discharge, i.e. quitting in the middle of the job, rather than the sufficiency of the evidence to establish any unlawful motivation?

In connection with this, a subsidiary question raised by the decision below is whether the Circuit Court of Appeals may disregard the uncontradicted testimony that Edmunds, the production manager, stated *eo instante* that the discharge was because the newspaper "could not do business that way."

(d) Statute Involved

The pertinent provisions of the National Labor Relations Act (61 Stat. 140, 146, 147, 65 Stat. 601, 29 U. S. C. (Supp. V), §157, 158, §160(c), 29 U. S. C. A.

§157, 158, 160(c)) are set forth in the Appendix, *infra*, pages xviii-xix.

(e) STATEMENT

Petitioner is a Washington corporation publishing a daily newspaper in Spokane, Washington, The Spokesman-Review, with a large Sunday edition. Petitioner employed part-time "inserters" to assemble the different sections of the Sunday paper (R. 32; 76-77). The 16 "inserter" employees involved in this proceeding were not members of a union, and no effort had been made at any type of labor organization at any time. Most of them were local college students, who worked an irregular number of hours which they were permitted to schedule largely at their own convenience (R. 32, 33; 183, 117, 137, 177 and 310). However, they were required to work every Saturday evening from 6:00 o'clock until all the Sunday papers were finally assembled, usually nine or ten hours later (R. 32, 184, 117).

During Saturday evening and until sometime between 2:30 and 4:00 a. m. Sunday morning, as a general rule the inserters would process four editions of the Sunday paper by manually assembling and inserting the newly printed sections of the paper as it came off the press (R. 296). It was essential that the four editions or runs of the newspaper go off according to schedule because there were various train and bus

schedules to meet, and consequently all the inserters reporting for work on a Saturday night were supposted to work on all four editions (R. 296, 297, 298). The very nature of the process depended on speed and in a matter of approximately 15 to 20 minutes every inserter was given papers after the respective starting times of the press (R. 296). For the evening of August 23, 1952, and the early morning of August 24, 1952, the starting times of the paper were as follows:

First Edition _____Plate 6:02 p. m., Press 6:06 p. m.
Second Edition ___Plate 6:26 p. m., Press 6:45 p. m.
Third Edition ____Plate 7:39 p. m., Press 7:40 p. m.
Fourth Edition ___Plate 9:21 p. m., Press 9:23 p. m.
(R. 393.)

The amount of piecework an inserter did and consequently the amount of pay he received depended upon his own industry or speed in manually inserting the sections of the paper (R. 295). Ordinarily at the end of the third edition the inserters were permitted to go and do as they pleased until the last edition (R. 296), but it was vitally important, as far as the first three editions were concerned, that they remain in the mailing room because of the tight train and bus schedules receiving the first three editions of the paper (R. 297, 298).

The inserters were paid on the basis of a piece-rate which varied in proportion to the weight of the sections assembled and the ability of the individual inserters

(R. 32; 119). The precise rate for a given section was often unknown until after that particular section had been inserted (R. 35; 119, 195). Some of the inserters were dissatisfied over this and also a shortage of locker-room facilities. Although there was some minor complaining about these matters, it was considered usual and no significance was attached by anyone to it and the complaining among the inserters themselves was never communicated to management (R. 117, 119, 121, 124, 153, 189, 331, 332, 368, 369, 370).

It is likewise undisputed that petitioner, prior to the night of August 23, 1952, had never manifested any hostility toward any individual inserter or to the inserters as a group, or manifested any hostility toward their organization into any union at any time or place, or ever opposed or interfered with their right to hold formal or informal meetings, and had no knowledge whatsoever of an informal meeting of the inserters held on August 17, 1952, in which a written resolution (Ex. 2) was drawn up by one of the inserters, Howard, demanding a pay increase of 20%, individual lockers, and the posting of petitioner's standard for computing the piecework. The Trial Examiner found that the execution and the presentation of this written resolution was given without any notice at all to petitioner (R. 44). This was amply brought out by the record (R. 121, 126, 138, 159, 185, 191, 194, 199, 227, 234, 372 and 390). Petitioner's production manager,

Edmunds, was the only supervisory employee of petitioner's who had authority to deal with such matters and the inserters knew this (R. 142).

The inserters, knowing that Edmunds, the production manager, was absent from the premises (R. 142) handed at 6:20 p. m., August 23, 1952, the written resolution (Ex. 2) to Munkers, a temporary foreman, who was informed that he should bring it to the attention of Edmunds, the production manager, promptly inasmuch as the inserters had decided to strike at 7:00 p. m. if their demands were not met (R. 39). At that time, 6:20 p. m., the first edition of the paper had already gone to press and the press time of the second edition was at 6:45 p. m. (R. 393). All the inserters ceased work in concert at 7:00 p. m. and left the mailing room at least ten minutes before Edmunds, the production manager, was even able to get to the plant from his home (R. 39). Edmunds and two other supervisory employees proceeded to the plant, arriving a little after 7:00 o'clock. Meanwhile, the papers continued to come from the press and the management of petitioner was fully occupied in getting replacements for the inserters.

These replacements in this piecework job that night in part came before 8:00 p. m. from a permanent list of former inserters and other employees and the employees of a printing plant. There was no evidence as to how many of these replacements were temporary or

permanent, or any testimony as to which of the 16 inserters involved in this proceeding had their piecework job taken by a permanent or temporary replacement that night before 8:00 o'clock.

At about 7:40 p. m. temporary foreman Munkers approached the inserters and said, "If any of you men want your jobs back, go upstairs and talk to Edmunds and do it one at a time" (R. 40; 210, 130, 397-398). However, the inserters presented themselves to Edmunds in a body at approximately 7:50 p. m. (R. 40-41; 211, 212, 85-86, 88). This meeting lasted but a few minutes and only Edmunds spoke (R. 41; 132, 89, 212-214). He described the inserters' action as "unprecedented," criticized the short notice they had given petitioner, and declared that petitioner newspaper could "not do business this way" (R. 41; 213, 132). Asserting that petitioner newspaper had "no other alternative," he concluded by informing the inserters: "Consequently, you gentlemen are all through" (R. 41; 213, 132, 250, 398, 409, 422, 429).

By virtue of the replacements obtained before this two-minute meeting petitioner was able to get its paper out that night (R. 41; 301, 361-362). On the following Friday, August 29, 1952, Howard, one of the inserters, as spokesman for the others, asked production manager Edmunds for their reinstatement, but the request was denied on the grounds that they had all been replaced (R. 43; 216, 217, 110, 134, 238-239, 372-373).

On the basis of the foregoing facts 16 of the inserters filed with the Board a charge that the petitioner newspaper, by discharging them, had engaged in an unfair labor practice. The Board filed a complaint based on charges of these 16 individual inserters, and after a hearing in which only testimony concerning seven out of the 16 individuals (R. 10) was taken, found that the 16 inserters had engaged in an economic strike on August 23, 1952, and that petitioner, by discharging the 16 inserters for striking, violated Section 8 (a) (1) of the Act (R. 46, 47). The Trial Examiner made detailed findings of fact, among them that the execution and presentation of the written resolution (Ex. 2) setting forth the grievances of the inserters came without any notice at all to petitioner (R. 44). The Board ordered petitioner to reinstate the inserters to their piecework jobs (one inserter, Orval Dean, did not desire reinstatement and his reinstatement was not ordered (R. 52, n5)), to post the usual notices and to cease and desist from engaging in conduct violative of Section 8 (a) (1) of the Act (R. 26, 27; 106 N. L. R. B. 131), and later petitioned the Court of Appeals for the Ninth Circuit for enforcement of its order.

The Ninth Circuit on June 28, 1954, entered its opinion and entered its decree (App. ii-ix) with two justices upholding the Board and one justice holding that the petition for enforcement should be dismissed. That court's majority opinion modified the Board's

order by eliminating paragraph 1(b) of the cease and desist order, but enforced the posting of notices provisions and the reinstatement with back pay provisions. Subsequently, that court entered an order denying a petition for rehearing and a petition to remand on behalf of petitioner on August 3, 1954, and on August 10, 1954, an order staying issuance of mandate was entered pending disposition of this Court of petitioner's petition for certiorari.

(f) Reasons for Granting the Writ

(1) THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

If the inserters were discharged, it was for cause. They quit right in the middle of the job when the papers were coming from the press. They were like sailors who mutinied. There was no reason for their reckless conduct. As the dissenting opinion aptly pointed out:

> "The action of the Board officials indicates that they thought this course was eminently proper. If the theory is sound, every railroad union in America could quit, formulate a general demand for higher compensation throughout the nation, and give the railroads five minutes' notice to get the demands or all trains would cease to move.

> Responsible labor groups do not 'bargain' in that fashion." (App. viii-ix.)

Nevertheless, the majority opinion appears to condone this conduct and in so doing ignores the reason for the discharge.

In construing the Act, this Court has said in *N. L. R. B. v. Jones-Laughlin,* 301 U. S. 1, 45; 57 S. Ct. 615, 618, that it "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them;" that the employer "may not under cover of that right intimidate and coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation or coercion."

In *International Union v. Wisconsin Employment Relations Board, et al,* 336 U. S. 245, 69 S. Ct. 516, decided February 28, 1949 (rehearing denied May 2, 1949), this Court has pointed out:

> "* * * Section 7 of the Act expressly guarantees employees the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection. *We do not interpret this to mean that it is unlawful for an employer to discharge an employee for any activity sanctioned by a union or otherwise in the nature of collective activity.*" (Italics ours.)

In the case at bar, with the record showing no discriminatory motives of the employer whatsoever, the Board must have followed a fixed interpretation that all work stoppages are federally protected concerted activities. However, this Court stated in the *Wisconsin Employment Relations Board case, supra,* at Page 523, after reviewing a number of Courts of Appeals' decisions from various circuits (not including the Ninth Circuit): "To hold that the alleged fixed Board interpretation has irrevocably labeled all concerted activity 'protected' would be in the teeth of the Board's own language and would deny any effect to the Courts of Appeals' decisions."

Indeed, Section 8(d) of the National Labor Relations Act states, in spelling out in detail what is meant by bargaining collectively:

> "For the purpose of this section, to bargain collectively is the performance of the mutual obligations of the employer and the representative of the employees *to meet at reasonable times and confer in good faith* with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *" (Italics ours.)

Certainly the inserters ignored this public policy in selecting a period of 40 minutes in which the employer was to meet and accede to certain requests in the busiest period of the week while the papers were coming off the press. Nor can it be construed as a conference in "good faith" to select knowingly a time of 40 minutes when the management was not present.

### Indefensible Activity

The inserters' strike falls outside the "concerted activity" for "mutual aid and protection" embraced by Section 7 of the Act. While these inserters had the undisputed right to strike, their total conduct was inherently unlawful (within the meaning of the Act) even though violence was lacking. It was an unlawful invasion of property rights. They knew that the four editions of the newspaper had to go off on a tight schedule to meet various train and bus schedules (R. 296, 297, 298). They knew that the very nature of their work depended on speed and in a matter of approximately 15 to 20 minutes every inserter would be given newspapers after the respective starting times of the press (R. 296). They knew that the newspaper had to be published on time. They were discharged solely because at a critical time they walked out of the mailing room "in a manner reasonably calculated to harm the company's reputation and reduce its income."

*N. L. R. B. v. Local Union No.* 1229, 346 U. S. 464, 74 S. Ct. 172, 176.

As this Court said in *International Union v. Wisconsin Employment Relations Board, supra,* at 524:

> "That Congress has concurred in the view that neither Section 7 nor Section 13 confers absolute rights to engage in every kind of strike or other concerted activity does not rest upon mere inference."

This Court has recognized that the phrase "concerted activity" does not make every union activity, for example, a federal right. The same principle should apply to these 16 individual student inserters. This Court has held that a sit-down strike, *N. L. R. B. v. Fansteel Metallurgical Corporation,* 306 U. S. 240, 59 S. Ct. 490, 83, L. Ed. 627, 123 A. L. R. 599, a mutiny, *Southern S. S. Co. v. N. L. R. B.,* 316 U. S. 31, S. Ct. 886, 86 L. Ed. 1246, and a strike in violation of a contract, *N. L. R. B. v. Sands Mfg. Co.,* 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682, must be withdrawn from the literal language of Section 7 of the Act.

Where the record here shows (a) no familiar sequence of events involving knowledge by management of the grievances, (b) no warnings or interrogatories of employees, or (c) no background evidence showing any anti-labor or anti-union animus of the newspaper, it is inconceivable that this newspaper should not be allowed to discharge these 16 part-time inserters who quit in the middle of a press run.

As this Court recently said in *N. L. R. B. v. Local Union No.* 1229, 346 U. S. 464, 74 S. Ct. 172, decided December 7, 1953, "In its essence, the issue is simple. It is whether these employees * * * were discharged 'for cause.' "

In that case this Court held there is no more elemental cause for discharge of an employee than disloyalty to his employer and pointed out that Section 10(c) of the Taft-Hartley Act provides that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." In that case the employees were discharged because at a critical time in the initiation of the employer's television service, they distributed disparaging handbills calculated to harm the employer's reputation and reduce its income. In the case at bar the attack on the petitioner took the form of abandoning entirely the newspaper at a critical time as it came off the press.

As the dissenting opinion pointed out: "The inserters made abundantly plain that they wanted no palaver over the matter of compensation; that so far as they were concerned, the Sunday issue of the paper could remain in the plant." (App. viii.)

As this Court remarked in *N. L. R. B. v. Local Union No.* 1229, 74 S.Ct. 172 at 179:

> "Even if the attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in Section 7, the means used by the technicians in conducting the attack have deprived the attackers of the protection of that section when read in the light and context of the purpose of the Act."

Here there was legitimate cause for the employees' discharge, and there could be no presumption that the discharge was illegal.

> *N. L. R. B. v. Montgomery Ward & Co.*, 8th Cir., 1946, 157 F. (2d) 486.

It was recently held in the same circuit, in *N. L. R. B. v. Late Chevrolet Co.*, 8th Cir., 1954, 211 F. (2d) 643, that the mere discharge of employees with or without reason is not evidence of intent to affect the rights of employees under the National Labor Relations Act.

The Fourth Circuit has held that the mere discharge of an employee is not an unfair labor practice.

> *Joanna Cotton Mills Company v. N. L. R. B.*, 4th Cir., 1949, 176 F. (2d) 749.

As was aptly said in another newspaper case recently, *N. L. R. B. v. Houston Chronicle Publishing Co.*, 5th Cir. 1954, 211 F. (2d) 848 at 854:

> "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible to a misunderstanding and hard to prove or disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is, evidence possessed of genuine substance. In our opinion, this is not such a case."

In the case at bar the inserters were not discharged because they were attempting to bargain collectively, or even to present grievances, but as Edmunds, the production manager, stated *eo instante,* because the newspaper "could not do business that way." Finally, the attempt to distinguish between a temporary and permanent replacement to handle piecework made by the Trial Examiner (R. 42) was not sound as a matter of law and was not borne out by the record as a matter of fact. The rule has been stated in the Fifth Circuit that the employer is free to hire replacements for strikers at any time prior to their unconditional request for reinstatement.

> *N. L. R. B. v. U. S. Cold Storage Co.,* 5th Cir. 1953, 203 F. (2d) 927.

It is undisputed that no such request was made until six days after the walkout.

It is likewise undisputed that replacements for the striker-inserters were immediately necessary just as soon as the inserters stopped work, for the papers were even then coming off the presses. In these circumstances the advice of the majority opinion below—

> "We may add that had Edmunds, instead of summarily discharging these men, merely warned them that respondent would permanently fill their places in event they continued to strike, he would have been on safe ground,"—(App. vi)

is entirely unrealistic. The strikers had to be replaced in a matter of minutes. To say that *in this situation* management cannot discharge when the strikers were about to cease to exist because of replacements, is to require the manager to use an impractical degree of fine shading in his language.

## (2) THE COURT OF APPEALS OF THE NINTH CIRCUIT HAS SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Board was affirmed in its order to reinstate the discharged inserters when there was absolutely no evidence of any attempt to bargain collectively or any discriminatory motivation on the part of the petitioner employer towards any activity of the employees protected by the Act. In *N. L. R. B. v. Local Union No.* 1229, *supra,* this Court pointed out that "Many

cases reaching their final disposition in the Courts of Appeals furnish examples emphasizing the importance of enforcing industrial plant discipline and of maintaining loyalty as well as the right of concerted activity. The courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty."

These legal principles should apply in the newspaper publishing business.

### Burden of Proof and Character of Evidence Required

The Board, seeking reinstatement of the discharged inserters, had the burden of proving that the inserters "concerted activity" in presenting grievances, or any other "concerted activity" protected by the Act, was the basis for their discharge. In a number of other circuits the presumption is that an employer has not violated the statute. For example, the burden of proof is upon the one who asserts the fact to prove that the discharge of employees was because of union activity.

National Labor Relations Act, §1, et seq, 8 (1, 3 and 4), 29 U. S. C. A. §151, et seq, 158 (1, 3 and 4);

*N. L. R. B. v. Union Manufacturing Co.*, 5th Cir. 1942, 124 F. (2d) 332;

*N. L. R. B. v. Goshen Rubber & Mfg. Co.*, 7th Cir. 1940, 110 F. (2d) 432.

However, in this case the Board shifted the burden of proof to the newspaper employer and apparently ignored the nature of the newspaper business and the fact that the very nature of the inserters' piecework depended on speed (R. 296) and that they had to be replaced in a matter of minutes if the newspaper was to be put out on the streets in time. The Board brushed aside the asserted lawful reason for the discharge, i.e. quitting in the middle of the job, which was given by petitioner's production manager when he declared that petitioner newspaper could "not do business this way." (R. 41; 213, 132.) In other words, the decision of the majority opinion permitted the Board to shift the burden of proof and permitted the Board to base its findings on what it considered the inadequacy of the employer's justification, rather than upon any other sufficient evidence to establish an unlawful discharge. However, the Board always had the burden of proving discrimination and to prove that discrimination was employed in the discharging of the inserters because of their signing the written resolution (Ex. 2) by substantial evidence.

This Court in the case of *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229, 59 S. Ct. 206, stated as follows:

> "Substantial evidence is more than a mere scintilla. It means that such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

This Court there held that the provision in the Act stating that the rules of evidence prevailing in courts of law and equity shall not be controlling in proceedings before the Board, does not justify orders without a basis in evidence having rational probative force.

This Court in *N. L. R. B. v. Columbia Enameling & Stamping Co.*, 306 U. S. 292 at 300, pronounced:

> "Substantial evidence is more than a scintilla and must do more than create a suspicion of evidence of the fact to be established."

Petitioner appreciates that this Court will not review evidence or weigh testimony and will ordinarily approve the Board's order unless it is unsupported, as here, by substantial evidence. In this case there was a complete failure of proof in support of the Board's order.

## CONCLUSION

This was a very unusual proceeding with unique facts. The inserters' strike falls outside the "concerted activity" for "mutual aid and protection" embraced by Section 7 of the Act. A 40-minute ultimatum by employees, which was impossible to meet by the employer, surely is not a protected activity. As the dissenting opinion pointed out:

> "The circumstances here presented clearly indicate that the time element made bargaining of any sort an utter impossibility";

and as the writer of the dissenting opinion further pointed out:

> "Nothing in this record remotely suggested that Edmunds possessed authority to summarily grant the demanded raise without consultation with the owners of the newspaper. The fact that even the opportunity for such a consultation was completely foreclosed by the terms of the wage demand is a circumstance which seems to have absolutely no significance in the eyes of the Board officials." (App. viii.)

It is respectfully submitted that the importance of the questions involved to the newspaper publishing business in the Ninth Circuit and to every employer

generally and every newspaper in the country particularly is such as to require a full and complete hearing by this Court and a consequent reversal of the judgment of the Court of Appeals.

Respectfully submitted,

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# APPENDIX

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

vs.

COWLES PUBLISHING COMPANY,
*Respondent.*

No. 14,139

Jun. 28, 1954

*Petition for Enforcement of Order of the National Labor Relations Board*

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BEFORE: HEALY, BONE, and ORR, Circuit Judges

HEALY, Circuit Judge

In this case the primary finding of the trial examiner and of the National Labor Relations Board was that respondent violated §8(a) (1) of the Labor Management Act by discharging 16 of its employees for engaging in a concerted work-stoppage or strike. Respondent was ordered to reinstate the discharged employees with back pay from the date of their application for reinstatement, to post the customary notices, and to cease and desist from engaging in conduct violative of the Act.

Respondent publishes the Spokane Spokesman Review, a newspaper with a large Sunday edition. It

employed part-time "inserters," as they are called, to assemble the different sections of the Sunday paper. The inserters were not organized or members of any union. Most of them were local college students who worked an irregular number of hours which they were permitted to schedule largely at their own convenience. On each Saturday evening, however, they were required to work from six o'clock until all the Sunday papers were assembled, a task usually taking nine or ten hours. They were paid on the basis of a piece rate varying in proportion to the weight of the sections assembled. The precise rate for a given section was often unknown until after that particular section had been inserted.

It appears that this uncertainty of pay and a feeling that the total pay was inadequate, coupled with dissatisfaction over a shortage of locker room facilities, had been for some time a source of discontent on the part of the inserters. There is undisputed evidence that complaints as regards both the locker rooms and the smallness of the pay were several times brought to the attention of a Mr. Crooks, a day foreman for respondent. It appears, however, that the grievances had not been communicated to higher authorities. During 1952 the dissatisfaction was heightened when the organized mailers, who worked in the same room with the inserters, received a pay increase, whereas the unorganized inserters received none.

At an informal meeting of the inserters held on August 17 of that year a resolution specifying the grievances was drawn up by one of their number, Howard, demanding a pay increase of 20%, individual lockers, and the posting of respondent's standard for computing the piece rate. The resolution threatened economic pressure if the demands were not met. By the following Saturday, August 23, all the regular inserters had signed the resolution. At six o'clock that evening they decided to submit the resolution as soon as they began work at 6:15 and to strike at seven o'clock if their demands were not met. Pursuant to this decision Howard in company with another inserter handed the resolution to Munkers, acting foreman of the mailing room, and told him that a strike was planned for seven o'clock unless the demands stated in it were met. Munkers at once notified the assistant production manager, and the latter in turn telephoned Edmonds, the production manager for respondent, who ordinarily handled collective bargaining matters. Edmonds was at his home at the time. He and two other supervisory employees proceeded to the plant, arriving a little after seven o'clock. Meanwhile the inserters had stopped work at seven and had gathered in the locker room. They were asked by Munkers to stand by, as Edmonds would shortly be ready to see them. A few minutes later Munkers told them that if any of them wanted their jobs back they should go upstairs one at a time and talk to Edmonds. However,

the inserters presented themselves to Edmonds in a body.

The meeting apparently lasted but a few minutes, and Edmonds did the talking. He termed the inserters' action unprecedented, commented on the shortness of the notice and the consequent lack of time on the part of respondent to consider the demands, and suggested that an immediate decision thereon was not possible. He concluded by saying that respondent "could not do business that way," that there was but one alternative, and that "you gentlemen are all through." Edmonds had been seated during his remarks, but at this juncture he stood up and all present departed. The witnesses describing this occurrence did so in varying terms, but there was no important variation in the substance of their accounts of it. Nor is there any substantial dispute on respondent's part as to what Edmonds said.

Respondent was able to get its paper out that night only by calling upon former inserters, others of its employees, and employees of another plant. During the ensuing week it began hiring replacements for the striking inserters, completing this task sometime prior to Friday, August 29. On that day Howard, speaking for all the strikers, asked Edmonds to reinstate them. The request was denied on the ground that all had been replaced.

Respondent's contentions are (1) a half-hearted claim that the inserters were not in fact discharged, and (2) that, if discharged, their work-stoppage was an unprotected activity inasmuch as their plans had not been disclosed a sufficient time beforehand, and because they chose to strike under circumstances which would put respondent under the maximum of pressure.

The record abundantly supports the finding that the inserters were discharged, and that that action was taken because they had gone on strike. Moreover it is plain that the discharges occurred approximately an hour after the strike began and some days prior to the inserters' being permanently replaced. Further, there is no dispute that the strike was in support of specified demands for a raise in pay and for improved working conditions, submitted to the employer prior to striking.

It is settled law in this circuit that an employer is at liberty to replace employees who engage in a concerted work stoppage for economic objectives. But it is equally settled that he may not, prior to replacing the employee, *discharge* him for engaging in such activity. NLRB v. Globe Wireless, 9 Cir., 193 F. 2d 748, and authorities cited; NLRB v. Buzza-Cardozo, 9 Cir., 205 F. 2d 889, cert. denied 346 U. S. 923. Accordingly unless for the reasons advanced by respondent the strike here falls outside the area of concerted activity for mutual aid and protection, the finding of the Board

that respondent violated §8(a) (1) of the Act was appropriate.

We see no ground for believing that the shortness of the notice given by the inserters and the precipitate action thereafter taken by them renders their strike unprotected. In *Globe Wireless,* supra, the employees involved were held protected from discharge even though, as was true in that instance, they had stopped work before their grievances were presented. The case before us is not one where a strike was had in repudiation of a contract not to strike, nor was it a wildcat strike, or an attempt by the employees unilaterally to prescribe their own working conditions, as was the situation in the cases relied on by respondent.

We may add that had Edmonds, instead of summarily discharging these men, merely warned them that respondent would permanently fill their places in event they continued the strike, he would have been on safe ground.

Respondent objects to the breadth of paragraph 1(b) of the Cease and Desist Order, which reads:

"1. Cease and desist from:

. . . .

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the pur-

pose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(3) of the Act."

We agree that in the circumstances of this case the paragraph is unjustifiably broad, and to that extent the Board's order is modified. Cf. Labor Board v. Express Publishing Co., 312 U. S. 426. Paragraph (a) would seem to sufficiently cover the matter.

Decree will be entered enforcing the order as modified.

BONE, Circuit Judge dissenting.

I would deny enforcement of the Board's order as it was modified by the majority.

The unusual facts shown by the record in this case clearly indicate that an abrupt demand for a wage increase was first made by the inserters on certain minor employees of respondent then engaged in and about respondent's plant. The demand was carefully timed to come at an hour on late Saturday evening when these minor employees faced the necessity of then getting out the Sunday edition of the paper to meet certain time schedules. The demand was in the form of

an ultimatum—"grant us the demanded raise at once or get the papers out anyway you can."

As the prevailing opinion points out, an employee (Edmonds) who ordinarily handled collective bargaining matters was then called from his home, arriving after the inserters had stopped work at 7:00 p. m. Some colloquy then ensued, but nothing in the record suggests that Edmonds possessed authority to summarily grant the demanded raise without any consultation with the owners of the newspaper. The fact that even the opportunity for such a consultation was completely foreclosed by the terms of the wage demand, is a circumstance which seems to have absolutely no significance in the eyes of the Board officials.

Much in the way of fulsome praise of the "collective bargaining" procedure has appeared in court comments and in articles by those friendly to organized labor. But the circumstances here presented clearly indicate that the time element made "bargaining" of any sort an utter impossibility. The inserters made abundantly plain that they wanted no palaver over the matter of compensation; that so far as they were concerned, the Sunday issue of the paper could remain in the plant. The action of the Board officials indicates that they thought this course was eminently proper. If the theory is sound, every railroad union in America could meet, formulate a general demand for higher compensation throughout the nation, and give the rail-

roads five minutes notice to meet the demand or all trains would cease to move. Responsible labor groups do not "bargain" in that fashion.

It is not amiss to point out that a week (or even less) of "negotiations" through official channels might have been quite sufficient to bring about an amicable adjustment of the instant wage demand, and it cannot be doubted that any raise of pay which resulted could have been made retroactive to cover the Saturday work and future work. The action of the inserters, along with that of the Board, made impossible such a reasonable solution. The least that can be said about this suggestion is that it would have ended this tempest in a teapot.

The incontinent haste which characterizes every aspect of this very unusual proceeding is not calculated to add dignity to Board proceedings or encourage collective bargaining. It justifies application of the pointed and pertinent remarks of the Fifth Circuit appearing in the first two paragraphs of the opinion in N. L. R. B. v. Roscoe Skipper, Inc., No. 14,885, June 18, 1954.

(Endorsed:) Opinion and Dissenting Opinion. Filed Jun. 28, 1954. Paul P. O'Brien, Clerk.

## DECISION AND ORDER

On April 24, 1953, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner found, further that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended dismissal of those allegations of the complaint. Thereafter, the General Counsel and Respondent filed exceptions to the Intermediate Report and supporting briefs.

The Board[1] has reviewed the rulings made by the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed.[2] The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case and hereby adopts the findings, conclusions, and

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[1]Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

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[2]The Respondents' request for oral argument before the Board is hereby denied, inasmuch as the record, including the exceptions and briefs, adequately presents the issues and the positions of the parties.

recommendations of the Trial Examiner with the following modifications:

In agreement with the Trial Examiner, and for the reason detailed in the Intermediate Report, we find that the Respondent discharged the striking inserters on August 23, 1952, thereby violating Section 8 (a) (1) of the Act.

## THE REMEDY

The Trial Examiner, in Section V of the Intermediate Report, recommended the back pay for the inserters be computed from the date of their discriminatory discharge on August 23, 1952, rather than from August 29, when they applied for reinstatement. Under ordinary circumstances, an employee who is discharged in violation of the Act is awarded back pay from the date of the discharge, and not from the date he applies for reinstatement. However, where, as in this case, employees are discriminatorily discharged while engaged in a strike, it is the Board's practice to award back pay from the date of the dischargees' unconditional request for reinstatement, rather than from the date of discharge, as their loss of wages cannot conclusively be attributed to their discharge until the employees indicate their willingness to abandon the strike.[3] The Trial Examiner did not follow this prac-

[3]Kallaher & Mee, Inc., 87 NLRB 410, 413

tice in the instant case, but awarded back pay from the date of discharge of the inserters on August 23, rather than from August 29, the date they sought reinstatement. In so doing, the Trial Examiner cited the absence of any evidence in the record that the inserters remained on strike after their discharge. However it is clear that the inserters did not work for the Respondent during the period from August 23 to 29 and there is no evidence that they accepted other employment of any kind, or that they took themselves entirely out of the labor market. Nor is there any evidence that prior to August 29, 1952, they abandoned the demands for which they had struck on August 23. Under these circumstances, we find that the strike continued until August 29 and we will in conformity with our usual practice, compute back pay from August 29, instead of August 23.

## ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that Respondent, Cowles Publishing Company, Spokane, Washington, its officers, agents, and successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of the right to present grievances and to engage in concerted activities for mutual aid or protection.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to the 16 employees named in Appendix A, attached to the Intermediate Report, save Orval Dean, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Make whole the aforesaid 16 employees for any loss of pay they may have suffered by reason of

Respondent's discrimination against them, in the manner set forth in the section entitled "The Remedy," in the Intermediate Report and Decision herein.

(c) Upon request, make available to the Board or its agents for examination or copying all payroll, social security, and personnel records necessary to analyze the amounts of back pay due under the terms of this Order.

(d) Post at its plant at Spokane, Washington, copies of the notice attached to the Intermediate Report as Appendix A.[4] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by Respondent's authorized representative, be posted immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[4]This notice shall be amended by substituting for the words "The Recommendations of a Trial Examiner," the words "A Decision and Order." If this Order is enforced by a decree of a Circuit Court of Appeals, the notice shall be further amended by substituting for the words "Pursuant to a Decision and Order" in the caption, the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

(e) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps Respondent has taken to comply herewith.

It Is Further Ordered that the complaint be dismissed insofar as it alleges that Respondent has refused to bargain collectively with the representatives of its employees.

Signed at Washington, D. C., August 20, 1953.

JOHN M. HOUSTON, Member.

PAUL L. STYLES, Member.

IVAR H. PETERSON, Member.

(Seal) NATIONAL LABOR RELATIONS BOARD.

## UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

vs.

COWLES PUBLISHING COMPANY,
*Respondent.*

No. 14139

## ORDER STAYING ISSUANCE OF MANDATE

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Upon application of A. W. Witherspoon, Esq., counsel for the Respondent, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 26 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the 20th day of September, 1954, herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before September 20, 1954. In the event the petition for writ

of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

WILLIAM HEALY,
United States Circuit Judge.

Dated: San Francisco, Calif.
August 10, 1954.

(Endorsed)
Filed: August 10, 1954.
PAUL P. O'BRIEN, *Clerk.*

The pertinent provisions of the National Labor Relations Act (61 Stat. 140, 146, 147, 65 Stat. 601, 29 U. S. C. (Supp. V), §157, 158, §160(c), 29 U. S. C. A. §157, 158, §160(c)) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3).

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *."

"Sec. 10. * * *

*

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or

is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. *No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.* * * *"

(Italics supplied in last sentence.)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*
v.
COWLES PUBLISHING COMPANY,
*Respondent.*
No. 14,139

## DECREE ENFORCING AN ORDER AS MODIFIED OF THE NATIONAL LABOR RELATIONS BOARD

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Before: HEALY, BONE AND ORR, *Circuit Judges.*

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated August 20, 1953. The Court heard argument of respective counsel on June 3, 1954, and has considered the briefs and the transcript of record filed in this cause. On June 28, 1954, the Court, being fully advised in the premises, handed down its decision enforcing as modified the said order. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondent, Cowles Publishing Company, Spo-

kane, Washington, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of the right to present grievances and to engage in concerted activities for mutual aid or protection.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the National Labor Relations Act, as amended (hereinafter referred to as the Act).

(a) Offer to the 16 employees named in Appendix A, attached hereto, save Orval Dean, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Make whole the aforesaid 16 employees for any loss of pay they may have suffered by reason of Respondent's discrimination against them in the manner set forth in the section entitled "The Remedy," in the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated April 24, 1953, and Decision of the Board dated August 20, 1954.

(c) Upon request, make available to the Board or its agents for examination or copying all payroll, so-

cial security, and personnel records necessary to analyze the amounts of back pay due under the terms of this Decree.

(d) Post at its plant at Spokane, Washington, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Nineteenth Region, Seattle, Washington, shall, after being duly signed by Respondent's authorized representative, be posted immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify aforesaid Regional Director in writing, within ten (10) days from the date of this Decree, what steps Respondent has taken to comply herewith.

(Endorsed)
Decree Filed and Entered September 7, 1954.

/s/ PAUL P. O'BRIEN,
Paul P. O'Brien, Clerk.

A True Copy.
Attest:

Paul P. O'Brien, Clerk.

## APPENDIX A

## NOTICE TO ALL EMPLOYEES

Pursuant to

A Decree of the United States Court of Appeals enforcing as modified an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the right to present grievances and to engage in concerted activities for mutual aid or protection.

WE WILL OFFER the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed and make them whole for any loss of pay suffered as a result of the discrimination against them.

| | |
|---|---|
| THOMAS P. HOWARD | ERNEST P. CAGLE |
| FRANK CASTAGNA | JAMES DREIS |
| C. EDWIN ELKINS | CLAYTON H. ELLIS |
| GEORGE GRADER | HAROLD J. HIMMELSBACH |
| JAMES S. HOGAN | PHILLIP M. O'NEILL |
| JOSEPH PEDERSEN | W. STANLEY RIDDLE, JR. |
| ORVIN TJOSTOLVSON | GEORGE WEBER |

GEORGE PETERSON

WE WILL make whole ORVAL DEAN for any loss of pay suffered as a result of the discrimination against him.

**All our employees are free to become, remain, or refrain from becoming or remaining members of any labor organization.**

**COWLES PUBLISHING COMPANY**
**(Employer)**

**Dated**_____

**By**_____
**(Representative) (Title)**

**This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.**

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# In the Supreme Court of the United States

OCTOBER TERM, 1954

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No. 353

COWLES PUBLISHING COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court below (Pet. pp. i-ix) is reported at 214 F. 2d 708. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 23-57)[1] are reported at 106 NLRB No. 131.

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[1] In conformity with the Petition, references designated "R." are to the record in the court below. References preceding a semi-colon are to the Board's findings; succeeding references are to the supporting evidence.

### JURISDICTION

The decision of the court below (Pet. pp. i-ix) was issued on June 28, 1954. A petition for rehearing, filed on July 17, 1954, was denied on August 3, 1954. The petition for writ of certiorari was filed on September 18, 1954. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1), and under Section 10(e) of the National Labor Relations Act, as amended.

### QUESTIONS PRESENTED

1. Whether employees who went on strike during their working shift in support of lawful economic demands were engaged in a concerted activity for mutual aid or protection within the meaning of the Act.

2. Whether the Board properly found that petitioner violated the Act in discharging the employees who participated in the strike.

### STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth in the Appendix to the petition, pp. xviii-xix, are as follows:

#### LIMITATIONS

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede

or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

## STATEMENT

### I

### The Board's findings of fact

The Board found that the Company violated Section 8(a)(1) of the Act by discharging 16 of its employees for engaging in a concerted work stoppage. The subsidiary facts upon which these findings rest may be summarized as follows:

The Company publishes a newspaper with a large Sunday edition (R. 76). It employed part-time "inserters" to assemble the different sections of this edition (R. 32; 76-77). All of them were required to work every Saturday evening from six o'clock until all the Sunday papers were finally assembled, usually 9 or 10 hours later (R. 32, 33; 183, 184, 117).

The inserters were paid on the basis of a piece rate which varied in proportion to the weight of the sections assembled (R. 32; 119). However, the precise rate for a given section was often unknown to the inserters until after that particular section had been inserted (R. 35; 119, 195). This uncertainty of pay and a feeling that the total pay was inadequate, coupled with dissatisfaction over a shortage of locker room facilities, constituted a continual source of discontent on the part of the inserters (R. 34-35; 189-195, 197, 118-119). The em-

ployees repeatedly complained to the Company's supervisors about these matters, but the Company did nothing to remedy them (R. 197, 120-121, 156, 332, 367). The inserters' dissatisfaction was heightened when the organized mailers, who worked in the same room as the inserters, received a pay increase, whereas the unorganized inserters received none (R. 35; 121-123, 190-191, 137-138, 184, 270).

On the evening of Saturday, August 16, 1952, the inserters assembled a particularly heavy edition, the piece rate assigned to which the inserters deemed inadequate (R. 35; 194-196). During the following week, the inserters drafted and signed a resolution demanding a 20 percent pay increase, individual lockers, and the posting of the Company's standard for computing the piece rate (R. 35-37; 194-199, 124-125, 275-277). The resolution ended by threatening economic pressure if the demands were not met (R. 36-37; 275-276).

The following Saturday, August 23, the inserters decided to submit the resolution to the Company as soon as they began work at 6:15 and to strike at 7 o'clock unless their demands were met (R. 37-38; 199-202, 125-127). Accordingly, the inserters handed the resolution to their foreman and informed him that a strike was planned for 7 o'clock unless the demands contained in the resolution were met (R. 38-39; 188, 202-204, 127-128, 159-160,

317-318). The foreman got word to Edmonds, the production manager who ordinarily handles collective bargaining matters for the Company, at his home (R. 39; 74, 79-81, 317).

At 7 o'clock the inserters ceased work and gathered in the locker room (R. 39-40; 207-209, 129). At about 7:40 the employees were told that "if any of you men want your jobs back, go upstairs and talk to Edmonds and do it one at a time" (R. 40; 210, 130, 397-398). The employees presented themselves in a body to Edmonds and the other supervisors who had come down to the plant (R. 40-41; 211-212, 85-86, 88). Edmonds described their action as "unprecedented," criticized the short notice they had given the Company, and declared that the Company could "not do business that way" (R. 41; 212-213, 132). Asserting that the Company had "no other alternative," he concluded by informing the inserters, "Consequently, you gentlemen are all through" (R. 41; 213, 132, 250, 398, 409, 422, 429).

By calling upon former inserters, other Company employees, and employees of another concern, the Company was able to get its paper out that night (R. 41-42; 301, 362-363). The next week the Company began to fill the jobs of the discharged strikers, and completed this some time prior to August 29 (R. 42; 301-302, 373). On that day, the strikers sought reinstatement, but the Company refused on the ground that their jobs had been filled (R. 42-43; 216-217, 110, 134, 238-239, 372-373).

## II

### The Board's conclusions and order

On the basis of the foregoing facts, the Board found (R. 46-47) that the inserters had engaged in an economic strike on August 23 and that, by discharging them for striking, the Company violated Section 8(a)(1) of the Act. The Board ordered the Company to cease and desist from the unfair labor practices found, or from in any other manner interfering with the rights guaranteed the employees by Section 7 of the Act; to reinstate the inserters (except one not desiring reinstatement) with back pay from the date of their application for reinstatement; and to post appropriate notices (R. 26-27, Pet. pp. xii-xv).

## III

### The decision of the court below

The court below, sustaining the Board's findings and conclusions, held (one judge dissenting) that by going on strike to support specified demands for better wages and working conditions, submitted to the employer prior to striking, the inserters engaged in concerted activity for mutual aid and protection within the meaning of Section 7 of the Act, and that their discharge for participating in such activity, before their jobs had been filled, violated Section 8(a)(1) (Pet. pp. v-vi). Rejecting the Company's contention that the work stoppage was, in the circumstances, outside the protection of the Act, the court stated (Pet. p. vi):

> We see no ground for believing that the shortness of the notice given by the inserters and the precipitate action thereafter taken by them renders their strike unprotected. In *Globe Wireless,* [193 F. 2d 478 (C. A. 9)], the employees involved were held protected from discharge even though, as was true in that instance, they had stopped work before their grievances were presented. The case before us is not one where a strike was had in repudiation of a contract not to strike, nor was it a wildcat strike, or an attempt by the employees unilaterally to prescribe their own working conditions, as was the situation in the cases relied on by respondent.

The court enforced the Board's order with modifications not relevant here.

ARGUMENT

The holding of the court below, that the striking employees were engaged in "concerted activities * * * for * * * mutual aid or protection" within the meaning of Section 7 of the Act and that petitioner violated the Act in discharging them, is manifestly correct, accords with an unbroken line of circuit court authorities, and presents no issue warranting review.[2]

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[2] See *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817, 819 (C.A. 3); *Olin Industries, Inc.* v. *National Labor Relations Board,* 191 F. 2d 613, 615-616 (C.A. 5),

The Company's claim (Pet. 10-11) that the employees forfeited the protection of the Act because they struck on short notice "right in the middle of the job when the papers were coming from the press" finds no support in the statute or the authorities. The protection of the Act is not lost merely because employees go on strike when they can exert a maximum of economic pressure upon the employer. Each side in a strike is free to select the most opportune moment for advancing or resisting labor demands and nothing in the Act suggests that, in the absence of contractual restrictions, the right to strike, which is broadly guaranteed by the statute (Section 13), must be so exercised in point of time as to minimize its effect upon the employer.[3]

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certiorari denied, 343 U.S. 919; *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499, 501-502 (C.A. 5); *National Labor Relations Board* v. *Southern Silk Mills, Inc.*, 209 F. 2d 155, 210 F. 2d 824 (C.A. 6), certiorari denied, 347 U.S. 976; *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714, 717-718 (C.A. 8); *Modern Motors, Inc.* v. *National Labor Relations Board*, 198 F. 2d 925, 926 (C.A. 8); *National Labor Relations Board* v. *J. I. Case Co.*, 198 F. 2d 919 (C.A. 8), certiorari denied, 345 U.S. 917; *Kitty Clover, Inc.* v. *National Labor Relations Board*, 208 F. 2d 212, 215 (C.A. 8); *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9); *National Labor Relations Board* v. *Buzza-Cardozo*, 205 F. 2d 889, 890 (C.A. 9), certiorari denied, 346 U.S. 923.

[3] *Cf. National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817, 818 (C.A. 3); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714, 717-718 (C.A. 8); *Modern Motors, Inc.* v. *National Labor Relations Board*, 198 F. 2d 925 (C.A. 8); *Kitty Clover, Inc.* v. *National Labor Relations Board*, 208 F. 2d 212, 215 (C.A. 8); *National Labor*

Contrary to petitioner's assertion (Pet. 11-15), the decision below in this respect is not in conflict with the decisions of this Court in *International Union* v. *Wisconsin Employment Relations Board,* 336 U.S. 245, or *National Labor Relations Board* v. *Local Union No. 1229,* 346 U.S. 464. The strike here was in traditional form. It cannot be assimilated either to the intermittent work stoppages for unstated ends involved in the first case or to the disloyal attack upon the employer in the second case which "related itself to no labor practice of the company [and] made no reference to wages, hours, or working conditions."

Once it is recognized, as the court below properly held, that the strike was a protected activity, petitioner's additional contentions (Pet. 13, 17, 19-21) that it discharged the employees because their action disrupted its business operations rather than in reprisal for striking and that the Board had failed to rebut this defense must also be rejected. For where, as here, the discharge arises from the

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*Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9).

Both the Board and the courts have recognized that strikers may lose the statutory protection where in stopping work they fail to take reasonable precautions, or fail to give the employer an adequate opportunity, to protect the employer's physical plant from such imminent danger as foreseeably would result from a sudden cessation of work. *E.g., Marshall Car Wheel and Foundry Co.*, 107 NLRB No. 100; *Albrecht* v. *National Labor Relations Board,* 181 F. 2d 652 (C.A. 7). There is no suggestion in the record here, nor does petitioner assert, that the work stoppage jeopardized the safety of its operations or equipment.

employees' exercise of a protected right "an employer's protestation that he did not intend to encourage or discourage [union or concerted activities] must be unavailing where a natural consequence of his action was such encouragement or discouragement." *Radio Officers* v. *National Labor Relations Board,* 347 U.S. 17, 45. Obviously, a natural consequence of petitioner's action in discharging the strikers was to discourage the exercise of the right to strike in support of lawful economic demands.

Petitioner further suggests (Pet. 17-18) that it is "unrealistic" to view the discharge of the strikers as illegal because, instead of discharging them, it could have just as effectively, and lawfully, terminated their employment merely by replacing them, as it did, prior to their unconditional request for reinstatement. The suggestion overlooks the important consideration that although an employer confronted with an economic strike is free to hire permanent replacements for the strikers in order to conduct his business (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 345), he may not engage in reprisals against employees for exercising a right guaranteed by the Act. The discharge of employees for engaging in a strike constitutes such a prohibited reprisal and it has uniformly been recognized that the employer in that situation must reinstate the strikers upon application, dismissing, if necessary, employees

hired to replace the strikers, as here, *after* the unlawful discharge.[4]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1954.

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[4] *E.g., National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 928 (C.A. 2); *National Labor Relations Board* v. *Southern Silk Mills, Inc.*, 209 F. 2d 155, 210 F. 2d 824 (C.A. 6), certiorari denied, 347 U.S. 976; *National Labor Relations Board* v. *United States Cold Storage Corporation*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818; *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9); *National Labor Relations Board* v. *Buzza-Cardozo*, 205 F. 2d 889, 890 (C.A. 9), certiorari denied, 346 U.S. 923.

We do not read this Court's decision in *National Labor Relations Board* v. *Rockaway News Supply Co.*, 345 U.S. 71, 74-75, to reject the distinction between replacement and discharge in the context of this case. The Court there thought that the distinction as applied to the particular facts of that case was unreasonable.

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FILED

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

NO. 353

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COWLES PUBLISHING COMPANY, *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD

---

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

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## REPLY BRIEF OF PETITIONER

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On page 4 of its brief, the Board states that the student inserters "*repeatedly* complained to the company's *supervisors* about these matters, but the company did nothing to remedy them (R. 197, 120-121, 156, 332, 367)." Again on page 5 of its brief, the Board states "the employees presented themselves in a body to Edmunds and the other *supervisors* who had come down to the plant * * *" (italics ours). This is an attempt to warp this record into a rigid form of the Board's, unsupported by the facts, outlining that management knew of the alleged dissatisfaction of the stu-

dent-strikers prior to the two-minute meeting of August 23, 1952. Nothing could be further from the truth. An examination of the Board's references show that a few sporadic remarks addressed to a mailing room foreman, Howard Miller, and an acting foreman, Dana D. Crooks, admittedly not members of petitioner's supervisory staff and not "the other supervisors who had come down to the plant" the night of August 23, 1952, constituted the Board's whole case.

Considering the record seriatim as cited by the Board on page 4 of its brief:

R. 197—DIRECT TESTIMONY OF THOMAS P. HOWARD

"Q. Prior to that evening had you spoken to Mr. Miller or Mr. Crooks or Mr. Munkers about the locker room conditions?

"A. I believe that I, I will have to say I don't recall."

R. 120-121—DIRECT TESTIMONY OF PHILLIP M. O'NEILL

"Q. (By Mr. Walker): My question related to the information that you had received that the mailers had received a pay raise in June, 1952, or thereabouts.

"A. I can't recall.

"Q. All right. Now, do you know a Harold App?

"A. Yes.

"Q. And in June of '52 was he an inserter?

"A. Yes.

"Q. Around about June, '52, did you and Mr. App have a conversation with Mr. Crooks?

"A. Yes.

"Q. Where did that conversation take place?

"A. In the mailing room.

"Q. And what was said?

"A. Mr. App asked Mr. Crooks, or rather told Mr. Crooks, that the inserters were talking about asking for a raise, that they were dissatisfied with what they were getting, and asked Mr. Crooks if he knew anything about it and Mr. Crooks said that he would see about it.

"Q. (By Trial Examiner Bennett): When did you say this was?

"A. About, in June sometime, I would say.

"Q. (By Mr. Walker): Did you ever hear from Mr. Crooks about that?

"A. No."

R. 156—CROSS-EXAMINATION OF PHILLIP M. O'NEILL

"Q. What were you supposed to have said to Mr. Crooks?

"A. I didn't say anything. Mr. App said, asked Mr. Crooks, or told Mr. Crooks, that there was

discontent among the inserters, that they felt they should get a raise and wondered if he would see about it, or something to that effect.

"Q. How long a space of time, in how long a space of time did this conversation take place?

"A. Just a minute or so.

"Q. (By Trial Examiner Bennett): I understood you to testify before that Mr. Crooks did not reply.

"A. No, I didn't say that. Mr. Crooks said something like, 'I'll see about it,' or 'O. K.,' or something like that. It was a very short conversation.

"Q. (By Mr. Kelley): What was the occasion of your being there?

"A. We were sitting down and Mr. Crooks happened to walk by and Mr. App said, 'Mr. Crooks, just a moment,' and I was talking with Mr. App.

"Q. And you fellows had been down there to do some work, is that the story?

"A. Yes.

"Q. About what time of the day was this?

"A. I don't recall.

"Q. Was it in the afternoon?

"A. It could have been in the afternoon or morning, it could have been in the evening.

"Q. You have no recollection—and it lasted about a minute, you would say?

"A. Yes.

"Q. There was no other discussion with Mr. Crooks to your knowledge?

"A. No.

"Q. There wasn't any other discussion in any manner, shape or form, with anybody connected with the Cowles Publishing Company subsequent to that time, until August 23, 1952, isn't that correct?

"A. I discussed it with no one. What everyone else did, I don't know.

"Q. I see. But as far as you are concerned, there was no discussion?

"A. Correct.

"Q. That is your best testimony?

"A. Yes."

R. 332—DIRECT TESTIMONY OF JAMES P. MUNKERS

"Q. Did you hear any of the inserters complaining—

"A. (Interrupting): I always hear them hollering about their pay.

"Q. That morning?

"A. I couldn't say it was that morning.

"Q. (By Trial Examiner Bennett): If they had, it wouldn't be unusual?

"A. No, not at all.

"Q. (By Mr. Walker): Prior to August 23, had you heard the inserters complaining about the condition of their locker room?

"A. No, sir.

"Q. You never have heard that?

"A. No, sir.

"Q. From any inserter?

"A. No, sir."

R. 367—DIRECT TESTIMONY OF DANA D. CROOKS

"Q. I see. That Saturday night—I will withdraw that. There has been some talk here or testimony, proffered substantially, that a fellow by the name of Harold App was discussing locker conditions or possible pay raises or both, with Mr. O'Neill, and on one occasion you were walking through the locker room and they buttonholed you about that. Do you recall any such incident?

"A. Not any specific incidents, but they have asked me, several different ones, if we had a locker for them, which we didn't have a locker for all of them, but as far as asking me about more money, I don't remember anything about that."

The above half dozen excerpts from a 463-page record constituted the Board's entire case and are the only

references it can cite in its brief to this Court. If this Court is to grant certiorari, it will, in reviewing the record, perceive that neither these references nor any other part of the record support the assertion that management knew anything at all about the inserters' dissatisfaction. Not only that, but the record will affirmatively show that the management never knew of Exhibit 2 until confronted with it and a 40-minute ultimatum August 23, 1952.

Acting foreman, Dana D. Crooks, who was not a member of petitioner's supervisory staff, testified as follows:

> "Q. Prior to August 23, 1952, Mr. Crooks, had any complaints been made to you by O'Neill, Howard, Riddle, concerning the matters outlined in Exhibit 2 there, that resolution?
>
> "Just take a look at it, if you want.
>
> "Trial Examiner Bennett: It is the second page there.
>
> "A. No, I don't recollect anybody coming to me about that. * * *
>
> "Q. Before or after 7 p. m., August 23, 1952, did you have any knowledge of any meetings of the inserters discussing their working conditions and taking votes and calling for resolutions and things of that nature?
>
> "A. None whatsoever.

"Q. Did you on or before August 23, 1952, ever have any knowledge of any demands for raise in pay or betterment of working conditions or cleaning up the locker room or anything of that character?

"A. No.

"Q. Before or after August 23, 1952, did you ever have any requests from Howard or O'Neill or Riddle or any of those inserters set forth there on Exhibit 2, for meetings to discuss or bargain or both, concerning these matters with the Cowles Publishing Company?

"A. None. * * *

"Q. Directing your attention to Exhibit 2, that being the resolution that Mr. Howard has testified he drew up, did you have any authority to pass on any of those matters set forth in that exhibit?

"A. No, I had not.

"Q. By the way, did you happen to know—when is the first time you ever saw that exhibit?

"A. I think I got a glimpse of it that Saturday night, after I came down, on August 23.

"Q. I see. That Saturday night—I will withdraw that. There has been some talk here or testimony, proferred substantially, that a fellow by the name of Harold App was discussing locker conditions or possible pay raises or both with Mr. O'Neill, and on one occasion you were walking through the locker room and they buttonholed you about that. Do you recall any such incident?

"A. Not any specific incidents, but they have asked me, several different ones, if we had a locker for them, which we didn't have a locker for all of them, but as far as asking me about more money, I don't remember anything about that.

"Q. Was there any distinction and discrimination with respect to the apportionment of lockers or anything like that?

"A. No. The oldest men who had been there longest had the keys and the newer ones who came in, didn't have any locker.

"Q. You had so much locker space and so many lockers, is that right?

"A. That is right.

"Q. You had so much space to put them in?

"A. That is right.

"Q. The first ones that were there had the keys, is that it?

"A. That is right.

"Q. As they got through school or left employment, or at least ceased being inserters, why, the fellows who came later got their keys?

"A. That is right" (R. 363, 365, 366, 367, 368.)

On cross-examination, he testified:

"Q. I take it, Mr. Crooks, complaints by the inserters about their pay rate wasn't unusual, was it?

"A. Well, I have heard them make remarks at different times about, 'Well, we should have a little more money for that,' but I have heard mailers make the same remark.

"Q. Before 6 o'clock on August 23, had any of the men whose signatures appear on General Counsel's Exhibit No. 2, reported to you that they would not work that night?

"A. No, sir." (R. 368, 369.)

Furthermore, if this Court is to review the actual record, it will observe that foreman Howard Miller also testified unequivocally that management never knew of the alleged dissatisfaction of the inserters. He testified as follows:

"Q. In any event, with respect to the activities that have been outlined here by the witnesses, O'Neill and Howard and Riddle, prior to August 23, 1952, did you have any knowledge of any of those discussions on activities?

"A. No, sir.

"Q. Did you ever receive any demands by any of the inserters here, or more specifically, Howard, O'Neill or Riddle?

"A. No, sir.

"Q. Did you ever receive any request for meetings by those, by the inserters named in this cause, that is, the 17, at all?

"A. No, sir.

"Q. More specifically, did you ever receive any request for any meeting with the three inserters, O'Neill, Howard and Riddle?

"A. No, sir.

"Q. In your capacity, at any time or place did you ever receive any requests in any manner, shape or form whatsoever for any collective bargaining or anything of that sort before 7 p. m., August 23, 1952?

"A. No, sir." (R. 292).

## No Interference With or Restraint or Coercion of Employees

Interference with or restraint or coercion of employees in the exercise of the rights guaranteed in Section 7, declared an unfair labor practice in Section 8(a)(1), falls for the greater part into one or more of the various types of employer conduct that this record shows was wholly lacking. The record shows no threats, espionage, black-listing, promises of benefit to employees who will resist unionization, attacks on employees, individual employment contracts, employer interference with election of collective bargaining representatives, interference with solicitation of union member-

ship, or refusals to bargain. The case at bar is unique in that its facts show no employer discrimination of any kind.

### The Board's Authorities

In reviewing the Board's cited decisions of this Court, petitioner has found none in conflict with the principle for which it is contending, namely, that the acts of precipitous disloyalty on the part of the inserters in the case at bar constituted sufficient cause for their immediate discharge or replacement because of their abandonment of the newspaper coming off the presses.

Petitioner has found no case similar on its facts to the case at bar. This was not a case of discriminatory discharge. This was not a violation of Section 8(a) (3) nor of section 8(a) (5) (R. 53). The other employees in the mailing room were organized union mailers. These part-time student-inserters had to be replaced immediately if the petitioner were to get its newspaper out that evening.

*Radio Officers v. National Labor Relations Board*, 347 U. S. 17, 74 S. Ct. 323, involved conflicting interpretations by courts of appeal of Section 8(a) (3) in utterly dissimilar fact situations which, however, impelled this Court to grant certiorari.

In *National Labor Relations Board v. Southern Silk Mills,* 209 F. (2d) 155, 210 F. (2d) 824, where this Court denied certiorari, 346 U. S. 818, the rule for which we are contending as enunciated in *National Labor Relations Board v. Local Union No.* 1229, *International Brotherhood of Electrical Workers,* 346 U. S. 464, 74 S. Ct. 172, decided December 7, 1953, was nevertheless recognized. As we read the *Electrical Workers* case, this Court held there that acts of disloyalty on the part of employees constituted sufficient cause for discharge because of the inherent nature of the act, likening such conduct to physical violence, insubordination and breach of contract, which are recognized grounds for lawful discharge.

It is true there was no violence in the case at bar; however, violence is not necessary for illegality. There is a common factual element in "sit-down" and "wildcat" strikes and that is that they conflict with established law. The established law with respect to the inserters was that there was implied in their contract of hiring that they would do the work assigned to them in a careful and workmanlike manner; that they would work so as not to injure the newspaper's business.

It was undisputed that the Saturday night when the strike occurred was the crucial time of the work week; that it was the one time that inserters were required to report for work at 6 p. m. (R. 32) and to remain in

the mailing room itself for the first three editions of the Sunday paper because of the tight train and bus schedules (R. 297, 298).

In *National Labor Relations Board v. Buzza-Cardozo,* 205 F. (2d) 889, certiorari denied 346 U. S. 923, this Court will recall that employees met with management and there was a demand and formal refusal of a wage increase, with the employees giving management at least 24 hours' notice. There the business was manufacturing and selling greeting cards; there was no reason to discharge the employees *instanter* and to fill their places at a later time. In the case at bar we have a strike which had for its immediate purpose the granting of demands within 40 minutes or the shut down of a newspaper.

Finally, we fail to see what comfort the Board can derive from *National Labor Relations Board v. Rockaway News Supply Co.,* 345 U. S. 71, 73 S. Ct. 519, under the unique facts in the case at bar. In the *Rockaway News* case, this Court held that an employee's breach of a provision in a collective bargaining agreement might be sufficient grounds for a discharge. In some extreme instances, such as the case at bar, acts of disloyalty in violation of a contract of hiring should certainly be sufficient.

The advice of the majority opinion in the case at bar:

> "We may add that had Edmunds, instead of summarily discharging these men, merely warned them that respondent would permanently fill their places in event they continued to strike, he would have been on safe ground,"—

was unrealistic. Edmunds had a newspaper coming off the presses at that very instant. As the late Mr. Justice Jackson pointed out in the *Rockaway News Supply* case, "Substantive rights and duties in the field of labor management do not depend on verbal ritual rites of medieval real property law."

## CONCLUSION

The evidence did not sustain the conclusion of the Board that management knew of the inserters' activity prior to the discharges. The decisions of this Court indicate there was sufficient cause for the discharges. It is respectfully submitted that the petition for a writ of certiorari should be granted with a consequent reversal of the judgment of the Court of Appeals.

Respectfully submitted,

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